

John A. Gilman // Natural Resources Protection Act
Permanent installation of boat lift – Belgrade

- Draft Proposed Board Order



STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION
17 STATE HOUSE STATION
AUGUSTA, ME 04333

DRAFT

IN THE MATTER OF

JOHN A. GILMAN
Belgrade, Kennebec County
PERMANENT BOAT LIFT
L-24660-2B-B-Z (denial)

) NATURAL RESOURCES PROTECTION ACT
) ALTERATION OF GREAT POND
) APPEAL
) FINDINGS OF FACT AND ORDER

Pursuant to the provisions of 38 M.R.S. Sections 344 and 341-D (4) and Chapter 2, Section 24 (B) of the Department of Environmental Protection's regulations, the Board of Environmental Protection has considered the appeal of JOHN A. GILMAN, its supportive data, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. PROCEDURAL HISTORY:

On February 10, 2009, Department staff inspected the property of John A. Gilman (appellant) and found that a permanent dock had been constructed and a permanent boat lift had been installed in Great Pond, which is considered to be a great pond pursuant to the Natural Resources Protection Act (NRPA), 38 M.R.S. Section 480-B(5). Department staff informed the appellant that his construction of permanent structures in a protected natural resource without a permit from the Department had violated the NRPA. On February 27, 2009, Department staff informed the appellant that he could use the boat lift on a seasonal basis or he could apply for a permit to maintain it as a permanent structure in a great pond. Temporary structures, which are defined as structures that are fixed in place less than seven months in any calendar year, are not regulated under the NRPA. On April 19, 2009, the appellant provided evidence that a permanent dock had been in existence prior to the establishment of the NRPA; however, a newly constructed dock had been placed in the same footprint. The appellant subsequently filed an after-the-fact Section 4, Permit By Rule (PBR #48221) for replacement of this structure in order to comply with Chapter 305, Permit by Rule Standards, at the request of the Department. Department staff approved PBR #48221 on June 12, 2009.

On July 17, 2009, the appellant filed an after-the-fact NRPA permit application which requested approval for the installation of a permanent boat lift in a great pond. The Department reviewed the application, and on August 11, 2009, the Department determined the application to be deficient for processing due to lack of information necessary to conduct a substantive review of the project. The application did not contain sufficient information in relation to the appellant's title, right, or interest in the property, plans for construction and erosion control, existing conditions of the project site, the amount of wetland and waterbody impacts, and alternatives to the project. The application was returned to the appellant, and he

was informed that the application could be re-filed at any time with the deficiencies corrected.

On August 20, 2009, the appellant re-filed an after-the-fact NRPA permit application in which the information deficiencies were corrected. The appellant requested approval for the installation of the permanent boat lift in a great pond. The boat lift measures 10 feet wide by 25 feet long. It is constructed on four aluminum support beams and is equipped with an associated canopy. The boat lift is located in Great Pond and is adjacent to the appellant's property. The Department denied the application in Department Order #L-24660-2B-B-N, dated January 21, 2010.

On February 4, 2010, the appellant filed an appeal of the Department's decision to the Board.

2. STANDING:

The Board finds that, as the appellant, JOHN A. GILMAN is an aggrieved person as defined in Chapter 2, Section 1(B) of the Department's rules and may bring this appeal before the Board.

3. BASIS FOR APPEAL:

The appellant objects to the Department findings and conclusions relating to the following:

- A. Freshwater Wetland and Waterbody Considerations; and
- B. Other Considerations.

The appellant asserts that the Department erred in its finding that the proposed activity would unreasonably harm significant wildlife habitat; freshwater fisheries; and freshwater, aquatic or adjacent upland habitat in that the construction and use of the proposed boat lift would result in a permanent loss of freshwater aquatic area and would have additional adverse impacts on the functions and values of the habitat, and that the appellant has access to the water by means of use of a seasonal system and other existing facilities within close proximity to the project site.

4. REMEDY REQUESTED:

The appellant requests that the Board reverse the January 21, 2010 Department decision denying after-the-fact approval for construction of a permanent boat lift on Great Pond in the Town of Belgrade.

5. DISCUSSION AND RESPONSE TO APPEAL:

A. FRESHWATER WETLAND AND WATERBODY CONSIDERATIONS:

The appellant requested after-the-fact approval for the installation of a permanent boat lift on a great pond, known as Great Pond. With its associated canopy, the boat lift measures 10 feet wide by 25 feet long and is supported on four aluminum beams.

- 1.) The appellant argues that the boat lift structure does not have an indirect impact of 250 square feet on the freshwater aquatic habitat and waterbody. The appellant contends that the indirect impact on the freshwater aquatic habitat is 90.3 square feet.

The application included evidence indicating that the boat lift, including the associated canopy, measures 10 feet wide by 25 feet long. Department staff also visited the project site on December 21, 2009 and confirmed the dimensions of the boat lift as stated in the application. In consideration of these dimensions, the Department calculated the total square footage of indirect impact over the project site, which includes portions of the waterbody and freshwater aquatic habitat, to be approximately 250 square feet.

The Board finds that the Department's methodology for calculating the total indirect impact on the protected natural resource to be credible and accurate. The Board further finds that the impacts to the protected natural resource are approximately 250 square feet as caused by shading from the structure and the canopy.

The Department's Division of Environmental Assessment (DEA) reviewed the application and its impacts, and comments that there are negative effects when permanent structures are placed in freshwater waterbodies. DEA further comments about these effects in the shallow water habitat adjacent to the shoreline saying that these effects, coupled with the detrimental effects on biological and human values of accumulating artificial structures along shorelines and the cumulative effects over time of on-site minor initial alterations, result in permanent structures having an adverse impact on lake quality.

The Board has considered the information in the record, including evidence provided by the appellant. The Board finds that the project will cause the permanent loss of a small amount of freshwater aquatic habitat and some adverse impacts on the waterbody. While the impacts are not large in scope, the cumulative impacts must be considered in light of the existing impacts on this resource, which includes the existing permanent dock on the appellant's property.

- 2.) The appellant argues that no practicable alternative to the proposed project exists and asserts that the alternatives that the Department considered in its decision are unreasonable.

Pursuant to Chapter 310, the Department's rules concerning Wetlands and Waterbodies, an applicant must provide an analysis of alternatives in order to demonstrate that a practicable alternative to a project does not exist. An applicant's alternatives analysis must include evidence that the applicant has avoided wetland and waterbody impacts if possible, and has kept the amount of wetland and waterbody to be altered to the minimum amount necessary.

The appellant stated, in the application, that the purpose of the boat lift is to access his boat from his existing dock and lower the boat into the water while he is seated. The appellant stated that a permanent boat lift would allow him to enjoy fishing in the lake. Although the appellant intends to use the boat lift to lower himself into the water while in the boat, the manufacturer of the boat lift, Shoremaster, typically issues a safety warning for all boat lifts which states that no one should be allowed on, in, or under a boat lift while in operation. The manufacturer states that the purpose of a boat lift is to launch a boat in the water and to store a boat out of the water when not in use.

The following alternatives to the proposed project were considered by the appellant:

- a. The appellant considered reducing the size of the boat lift, but concluded that this alternative is not feasible because all boat lifts are manufactured to have the same dimensions in order to service medium-sized boats.
- b. The appellant considered use of the boat lift on a seasonal basis, that is, less than seven months per year. The appellant stated that there is no upland area on his property where storage of the boat lift is possible, and that undertaking the removal of a seasonal system would require removal of all electrical wire. The appellant also argues that seasonal installation and removal of a seasonal structure would damage the shoreline.

The Department reviewed the appellant's alternatives analysis and concluded that the appellant failed to offer convincing evidence that the use of at least one existing facility is not feasible when cost, existing technology and logistics are considered and failed to demonstrate that its use would present an undue burden.

Regarding the use of a boat lift which would be a seasonal structure and not a permanent structure, the Maine Department of Inland Fisheries & Wildlife (MDIFW) comments that the appellant's contention that the presence of wiring prohibits such a plan fails, as a waterproof electrical coupling device can be used. MDIFW further states that seasonal removal of the structure would not cause unreasonable environmental impacts to the shoreline. Impacts such as erosion and damage to the shoreline would be minor, if any. Moreover, off-season storage of the boat lift can be achieved at other locations near the project site as discussed below.

The Board has considered the information in the record, comments provided by MDIFW, and evidence provided by the appellant. Based upon this information, the

Board understands that while boat lifts are not typically used to lift people due to physical limitations, the appellant may wish to use the boat lift in this manner. However, the appellant can use the boat lift on a seasonal basis up to seven months per year. The boat lift could be stored in the winter months on the existing permanent dock, which, in turn, would avoid disturbance of soil or vegetation along the shoreline. The evidence in the record demonstrates that storage during the winter months is also available at Great Pond Marina, as discussed below. The boat lift also appears to be fairly easily transportable and less bulky than most typical seasonal docks that people regularly install and remove each spring and fall. For these reasons, it is reasonable to conclude that seasonal removal of a boat lift would be less of a burden than to remove a seasonal dock. After review of photographs of the boat lift and project site and based on the layout of the project site and the fact that the appellant has an existing permanent dock, the Board finds that the use of a seasonal boat lift is a practicable alternative.

The Department determined that the appellant failed to adequately consider the use of a nearby public boat launch on Great Pond off Public Boat Landing Road in the Town of Belgrade. This public boat launch, which is approximately 0.7 miles from the project site, has adequate facilities to allow the appellant to access the resource. In the application, the appellant stated that his son launches the appellant's boat on a seasonal basis. Similarly, the appellant could utilize assistance at the boat launch to get his boat launched each spring and removed from the water each fall. There is also evidence in the record that a public marina, known as the Great Pond Marina, is located less than one mile from the project site off Marina Road on Great Pond in the Town of Belgrade. At a site visit on December 21, 2009, Department staff observed that this marina has at least one boat lift in an upland area of the property, provides a service of putting boats in the water, and has the capability to store boats and boat lifts. Department staff contacted the marina, and the marina staff stated that the facility has the capability to store boat lifts; however, the facility does not remove or transport boat lifts from a property. The marina typically refers customers to a third party contractor for services of removing a boat lift from the water.

After considering the availability of the alternatives, the Board finds that the appellant has practicable alternatives that would meet the project purpose and that would not result in permanent new construction in the great pond.

- 3.) The appellant argues that the proposed project was minimized to the greatest extent practicable. The application included a functional assessment entitled "Shoreline Functional Analysis", prepared by Kleinschmidt Associates and dated October 2009. This assessment identified the key functions and values within the waterbody and freshwater, aquatic, and adjacent upland habitat areas of the project site. Primary functions of the habitat within the project area were identified as Fish and Shellfish Habitat, Sediment and Shoreline Stabilization, Recreation, and Visual Quality. The appellant states that the assessment concluded that the proposed project would have minimal effect on the functions and values of the habitats at the project site. Based

upon the results of the assessment, the appellant contends that the proposed project need not be minimized.

According to Chapter 310 (5)(B), the amount of wetland or waterbody to be altered must be kept to the minimum amount necessary for meeting the overall purpose of the project. The NRPA application requires that an applicant must submit a statement that discusses how the project was designed to reduce impacts to the protected resource. Although the assessment stated that impacts from the proposed project would be minimal, the appellant did not outline any minimization strategies that were utilized to reduce impacts to the freshwater aquatic habitat and waterbody.

The Board finds that the use of a seasonal structure, as opposed to a structure permanently in the resource, is feasible and would minimize the amount of impacts on the protected natural resource.

- 4.) The appellant argues that the proposed project does not unreasonably harm significant wildlife habitat; freshwater fisheries; and freshwater, aquatic or adjacent upland habitat. The appellant states that the proposed project has the potential to provide aquatic cover and habitat structure in place of naturally occurring object cover because the existing shoreline lacks woody debris or other cover sources. The appellant points to his functional assessment for support of this argument.

The functional assessment submitted by the appellant includes a survey of aquatic and terrestrial wildlife within the vicinity of the project site. Results of the survey identified a number of mussel species and a specific species of terrestrial beetle. No terrestrial wildlife was observed during the survey; however, the assessment stated that the shoreline of the appellant's property contains a number of important shrubs used by a variety of wildlife. Results of the appellant's assessment concluded that habitat is present due to the amount of plant and wildlife species that were identified.

MDIFW stated in its review of the project that impacts to the great pond's fisheries from the boat lift would be minor. However, MDIFW stated that structures should be limited in terms of placement in a great pond for no longer than seven months in a calendar year. In response to the appellant's alternatives analysis, MDIFW commented that temporary installation and removal of the structure, if planned for, would not cause extensive environmental impacts as asserted in the application.

The Department's Division of Environmental Assessment commented that the appellant has adequate access to remove the structure, as other shoreline owners with similar boat lifts do so every year, and there is no evidence that the shoreline needs to be unduly disturbed to achieve removal.

The Board has considered the information in the record, including comments from MDIFW and DEA, the photographs of the site, and the evidence provided by the appellant. Based upon this information, the Board understands that the project

purpose is to launch the boat, remove it from the water, and to lower and raise the boat while the appellant is in his boat.

The appellant asserts that a permanent boat lift at his property is water dependent use and a necessary component for him to launch his boat and to access the water with greater ease on a year-round basis.

Pursuant to Chapter 310 (3)(W), a water dependent use is defined as “a use which cannot occur without access to surface water. Examples of uses which are water dependent include, but are not limited to, piers, boat ramps, marine railways, lobster pounds, marinas and peat mining. Examples of uses which are not water dependent include, but are not limited to, boat storage, residential dwellings, hotels, motels, restaurants, parking lots, retail facilities, and offices.” Based upon the appellant’s purpose of the project, the Board finds that while the appellant’s overall purpose of the boat lift is to launch his boat and to access his boat with ease meets the definition of a water dependent use, storage of a boat does not. Therefore, the Board finds that the appellant’s intention to store the boat at the boat lift when not in use does not qualify as a “water dependent use” pursuant to Chapter 310 (3)(W). The Board further finds that keeping the boat lift in place during the winter months for the purpose of storing a boat is not a water dependent use.

To determine whether the project would result in an unreasonable impact to the waterbody, the Board considered whether the impact of the project is necessary by weighing the impacts to the protected natural resource against the availability of alternatives. Although the overall impacts to the freshwater aquatic habitat and waterbody are minimal, the Board recognizes that undue impacts to the protected resource may occur over time as a result of shading effects on the area below the boat lift as well as the area not directly below the boat lift. Given that a permanent loss of freshwater aquatic habitat and waterbody can be avoided through the use of available alternatives, the Board finds that the appellant has not adequately demonstrated that the impacts to the protected natural resource cannot be avoided; thus, the proposed project would result in an unreasonable adverse impact to the freshwater aquatic habitat and waterbody.

B. OTHER CONSIDERATIONS:

The appellant asserts that the Department did not consider the appellant’s personal safety, disability, and health during review of the application, and by not considering particular safety and health concerns of the appellant when assessing whether alternatives are practicable, the Department is in violation of the Americans with Disabilities Act by denying the appellant’s due process and equal protection rights.

According to Chapter 310 of the Department’s Wetlands and Waterbodies Rules, when considering whether a single activity is reasonable in relation to the direct and cumulative impacts on the resource; the Department considers factors such as the degree

of harm or benefit to the resource; the frequency of similar impacts, the duration of the activity and ability of the resource to recover; the proximity of the activity to protected or highly developed areas; traditional uses; the ability of the activity to perform as intended; public health or safety concerns addressed by the activity; and the type and degree of benefit from the activity (public, commercial, or personal).

The Board has considered the information in the record, including evidence provided by the appellant. Based upon this information, the Board acknowledges the appellant's need to access the resource for recreation and that a boat lift allows him greater access to the resource, in light of physical limitations. The project is not a public facility. It is located on a private property and is intended solely for the appellant's recreational use and not for the general public. The Board can consider the appellant's need for the project in weighing the practicality of alternatives and the reasonableness of impacts. However, in light of the existence of practicable alternatives, the Board concludes that the use of the boat lift on a seasonal basis allows the appellant access to the resource for recreational uses without an unreasonable adverse effect on the resource.

Based on the above findings, the Board concludes that:

1. The appellant filed a timely appeal.
2. The appellant's after-the-fact proposal to permanently install a boat lift on Great Pond, in the Town of Belgrade does not meet the criteria for a permit pursuant to the Natural Resources Protection Act, 38 M.R.S. §480-D.

THEREFORE, the Board AFFIRMS Department Order #L-24660-2B-B-N denying the application of JOHN A. GILMAN which requests after-the-fact approval to install a permanent boat lift in a great pond in the Town of Belgrade, Maine and DENIES the appeal of JOHN A. GILMAN.

DONE AND DATED AT AUGUSTA, MAINE, THIS _____ DAY OF _____, 2010.

BOARD OF ENVIRONMENTAL PROTECTION

By:

Susan M. Lessard, Chair